2

No. 87-2083

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE MOZART COMPANY,
Petitioner,

VS.

MERCEDES-BENZ OF NORTH AMERICA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE A. CUMMING, JR.
Counsel of Record

MALCOLM T. DUNGAN
DARRYL L. SNIDER
THOMAS M. PETERSON
Brobeck, Phleger & Harrison
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
Telephone: (415) 442-0900
Attorneys for Respondent

Of Counsel:
ALLAN G. FREUND
WAYNE H. SAMSON
Mercedes-Benz of North America, Inc.
One Mercedes Drive
Montvale, NJ 07645
Telephone: (201) 573-0600

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS RESTATED

1. Is a partial exclusive dealing clause—ancillary to a perfectly lawful product distribution arrangement between respondent and 400 franchised dealers—illegal under Section 1 of the Sherman Act (or any other antitrust law), where:

a. The jury, on instructions prepared by petitioner and given at his request, returned a verdict against petitioner, specifically finding that the exclusive dealing clause protected both consumer expectations and the shared goodwill of the franchisor and all its retail franchisees; and

b. The court of appeals unanimously agreed with the district judge's finding that the verdict against petitioner was supported by substantial and persuasive evidence presented at an eleven-week trial; and

c. Respondent's market share was less than 2%; petitioner offered no theory or evidence suggesting that the exclusive dealing arrangement offends any of the legitimate concerns of present antitrust jurisprudence, and instead proposed a theory of "market power" that the court of appeals saw to be unanchored in economic reality?

2. Is petitioner automatically entitled to an offensive collateral estoppel, *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), where no exercise of *Parklane*-conferred discretion is even challenged, and petitioner's interest in a prior decision (the *Metrix* case) arose only after he had lost a full trial and a plenary appeal?

TABLE OF CONTENTS

	Page
Statement of the Case	2
1. Mercedes-Benz and the American Automobile Market	2
2. The Automotive Franchise System	4
3. The Generic Parts Business of John Mozart	8
4. Proceedings Below, Before Trial	9
5. The Full Trial in San Francisco, and the Plenary Appeal	11
Reasons for Denying the Writ	13
A. The Business Justification Defense Under Section 1 of the Sherman Act	13
1. Petitioner's Misunderstanding of the Jury's Verdict	13
2. That Toddlin' Town . . . the Trial Testimony of Professors Stigler and Brozen of Chicago	15
3. Less Restrictive Alternatives	18
4. No Conflict Exists Between This Case and Metrix	20
B. The Claims Under Section 2 of the Sherman Act and Section 3 of the Clayton Act	21
C. Offensive Collateral Estoppel	24
D. Of Digidyne and Intra-Circuit "Conflict"	27
Conclusion	30
Appendix: United States Department of Justice Release, March 15, 1982	A-1

INDEX OF AUTHORITIES

Cases

Page

American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3 Cir. 1975) 19n, 21
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 14, 21
Bell v. Dow Chemical Co., 847 F.2d 1179 (5 Cir. 1988) .. 22
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 14
Business Electronics Corp. v. Sharp Electronics Corp., ___ U.S. ___, 108 S.Ct. 1515, 99 L. Ed. 2d 808 (1988) 4, 13, 14, 18, 29
Continental T.V., Inc., v. GTE Sylvania, Inc., 433 U.S. 36 (1977) .... 2&n, 4, 13, 18n, 23, 24
Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9 Cir. 1984), *cert. denied*, 473 U.S. 908 (1985) ...... 13, 27&n, 28
In the Matter of General Motors Corp. and General Motors Sales Corp., 34 F.T.C. 58 (1941)...................19, 23
Hanson v. Shell Oil Co., 541 F.2d 1352 (9 Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977)...................... 9
Houser v. Fox Theatres Management Corp., 845 F.2d 1225 (3 Cir. 1988) 22
IAP, Inc., v. Mercedes-Benz of North America, Inc., 571 F.Supp. 262 (D.N.J. 1983) 10
International Business Machines Corp. v. United States, 298 U.S. 131 (1936) 18, 22, 23n
International Salt Co. v. United States, 332 U.S. 392 (1947) 23
Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) 2, 13, 14, 24, 29
Klamath Lake Pharmaceutical Ass'n. v. Klamath Medical Service Bureau, 701 F.2d 1276 (9 Cir.), *cert. denied*, 464 U.S. 822 (1983) 9, 17n
Krehl v. Baskin Robbins Ice Cream Co., 664 F.2d 1348 (9 Cir. 1982) 9
Metrix Warehouse, Inc. v. Daimler-Benz AG and Mercedes-Benz of North America, Inc., 1984-1 Trade Cases (CCH) ¶ 65,766 (D.Md. 1983) 10

INDEX OF AUTHORITIES

CASES

Page

Metrix Warehouse, Inc. v. Daimler-Benz AG and Mercedes-Benz of North America, Inc., 1984-2 Trade Cases (CCH) ¶ 66,226 (D.Md. 1984) ... 11

Metrix Warehouse, Inc. v. Daimler-Benz AG and MBNA, 828 F.2d 1033 (4 Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1753, 100 L.Ed.2d 215 (1988) ... 10, 20&n, 21, 25, 26&n

National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) ... 14, 29

Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370 (7 Cir. 1986), *reh. den. en banc*, 802 F.2d 217 (7 Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1574, 94 L.Ed. 2d 765 (1987) ... 15, 22

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) ... 2&n, 24, 25, 26

Pick Mfg. Co. v. General Motors Corp., 80 F.2d. 641 (7 Cir. 1935), *aff'd mem.*, 299 U.S. 3 (1936) ... 8, 23

Standard Oil Co. of California v. United States, 337 U.S. 293 (1949) ... 13, 18, 23, 24

United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977) ... 2&n, 28, 29

United States v. Mercedes-Benz of North America, Inc., 517 F.Supp. 1369 (N.D. Cal. 1981) ... 9

United States v. Mercedes-Benz of North America, Inc., 547 F.Supp. 399 (N.D. Cal. 1982) ... 10n

Warner & Co. v. Eli Lilly & Co., 265 U.S. 526 (1924) ... 9

Wisniewski v. United States, 353 U.S. 901 (1957) ... 28

Statutes

Clayton Act Section 3, 15 U.S.C. § 14 ... 21, 22, 24

Sherman Act:

Section 1, 15 U.S.C. § 1 ... 11, 12, 13, 14, 22, 24

Section 2, 15 U.S.C. § 2 ... 14, 21, 22

INDEX OF AUTHORITIES

Other Authorities

Page

B. Bock, *Business Judgment in Antitrust: The Role of a Valid Business Rationale in Modern Antitrust Jurisprudence*, 55 Antitrust & Trade Reg. Rep. (BNA) 109 (1988) .... 15n, 22&n

L. Iacocca, *Talking Straight* (1988) .... 3&n

Market Data Book Automotive News, p. 105 (1987) 2n

T. Piraino, *The Case for Presuming the Legality of Quality Motivated Restrictions in Distribution*, 63 Notre Dame L. Rev. 1, 20 (1988) 3n, 8

R. Posner, *Antitrust Policy and the Supreme Court: An Analysis of Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282 (1974) 5n

R. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1 (1977) 18n, 24

W. Scott, *The Talisman*, (1825) 21n

W. Shakespeare, *King Henry IV, First Part* (1598) 18

STATEMENT OF CORPORATE AFFILIATIONS

Respondent Mercedes-Benz of North America, Inc. ("MBNA") is a Delaware corporation whose ultimate parent is Daimler-Benz AG, the German manufacturer of Mercedes-Benz automobiles, trucks, buses and replacement parts. There is no public holding of or market for the stock of MBNA or any other United States subsidiary or affiliate of Daimler-Benz AG.

Daimler-Benz is an aktiengesellschaft ("share company") organized under the laws of the Federal Republic of Germany. The stock of Daimler-Benz AG is listed and traded on some exchanges in Europe, but is not listed or traded on any exchange (or regularly traded over-the-counter) in the United States.

No. 87-2083

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE MOZART COMPANY,
Petitioner,

vs.

MERCEDES-BENZ OF NORTH AMERICA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

This antitrust case involves a partial exclusive dealing clause appearing in the franchise agreement between respondent Mercedes-Benz of North America, Inc., ("MBNA") and each of the 400 franchised Mercedes-Benz dealerships through whom Mercedes-Benz automobiles and parts are distributed to the motoring public in the United States. After an eleven-week trial, and upon instructions written by petitioner Mozart, the jury returned a verdict against him. Denying petitioner's motion for judgment NOV, the district court observed that the evidence supporting the verdict was both "substantial" and "persuasive." The court of appeals recognized that the only significant issue was whether substantial evidence supported the jury's determination that MBNA had established a business justification for the challenged restraint. As four federal judges have now determined that this

verdict was proper, further review would be to none of the purposes expressed in Rule 17.

The court of appeals' rejection of petitioner's theory of "market power" (also given to the jury in instructions written by petitioner) confirms that the use of this particular franchise clause was entirely consistent with principles settled in *Jefferson Parish, GTE Sylvania and Fortner II.*[1] In short, the case should never have gone to the jury; but it did, and petitioner lost. His new-found interest in the *Metrix* case avails him nothing; both lower courts, in the careful exercise of the discretion conferred by *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), afforded petitioner a full trial and a plenary appeal. "Offensive collateral estoppel" is not available to one who wishes to escape the consequences of such proceedings. These issues are also fact-bound, and present nothing justifying a writ of certiorari.

STATEMENT OF THE CASE

1. Mercedes-Benz and the American Automobile Market

Mercedes-Benz automobiles and replacement parts are the products of Germany's Daimler-Benz AG, the world's oldest and most distinguished automaker. Today there are twenty-seven domestic and foreign automakers selling passenger cars in the United States. Americans purchased over 10 million new cars in 1987, of which General Motors sold approximately 3.7 million, Ford 2.1 million, Chrysler 1.1 million, Toyota and Honda over 600,000 each, and Mercedes-Benz about 90,000 (less than 1%). All automobiles are retailed in the United States under a franchise system. There are over 25,000 franchised automobile dealerships in the United States, of which only about 400 (less than 2%) are Mercedes-Benz dealerships.[2]

---

[1] *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.* 433 U.S. 36 (1977); *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610 (1977).

[2] *Market Data Book Automotive News*, p. 105 (April 1987).

Distribution of Mercedes-Benz products in the United States began in the 1950's, by Studebaker dealers under a distribution agreement between Daimler-Benz and Studebaker. Today, foreign automobiles are an important competitive factor, even though their sales still pale by comparison to those of the domestic manufacturers. But it was not always so, for the 1950's were the heyday of Detroit and " 'Made in America' meant the absolute best in the world," L. Iacocca, *Talking Straight* 249 (1988). Foreign cars in those days were but a handful of European curiosity pieces, and " 'Made in Japan' meant cheap and shoddy. Even the fireworks were lousy." *Id.* at 251.

But this was all to change, for while American firms emphasized short-term return at minimum financial risk, German and later Japanese manufacturers "were emphasizing technical excellence and investing heavily in product quality. These foreign producers realized that they could use quality affirmatively as a competitive weapon and that it would translate directly into higher shares of the American market."[3] The first to do so was Daimler-Benz. Unhappy with Studebaker dealers' inattention to proper servicing and repair of the Mercedes-Benz automobile, Daimler-Benz terminated its arrangement with Studebaker in 1964 and commenced direct distribution through MBNA, a subsidiary created for that purpose. MBNA initially franchised fewer than 200 dealers, each selected as an entrepreneur willing to promote an unfamiliar line of products, and to provide a level of service and repair crucial to the success of high-quality products in the American market. Today, despite its tiny market share, Mercedes-Benz is a pacesetter whose image is reflected in the competitive responses of American automakers, who emphasize quality, value and genuine parts, and those of one Asian manufacturer who flatly claims that its product is "the Mercedes-Benz of

---

[3] T. Piraino, *The Case for Presuming the Legality of Quality Motivated Restrictions in Distribution*, 63 *Notre Dame L. Rev.* 1, 20 (1988). Adds Chrysler's Iacocca: "Many companies kidded themselves that their profits would shoot up if they cut corners in quality. Well, plenty of industries, including the American auto industry, found themselves not gaining but losing market share because of shoddy products." L. Iacocca, *supra*, at 252.

small cars." And while Daimler-Benz hardly claims exclusive credit for the quality revolution, its contribution as the pioneer is beyond doubt.

2. The Automotive Franchise System

There are over 25,000 franchised automobile dealerships in the United States, of which only about 400 are Mercedes-Benz dealerships. The automotive franchise system has come to include many universal elements. Automobile franchise agreements generally require dealers to display the franchisor's trademarks, to employ factory-trained technicians, to use the manufacturer's sales materials, and to observe certain business hours. And all of them require dealers to maintain a factory-authorized service department offering genuine parts, a requirement also imposed by the laws of many states. See, generally, *Business Electronics Corp. v. Sharp Electronics Corp.*, ____ U.S. ____, 108 S.Ct. 1515, 1527-28 (1988) (Stevens, J., dissenting).[4]

The dealers and the franchisor expect and intend to convey to the public the message that each dealer is the manufacturer's representative in a particular locality. In each dealer's service department, the manufacturer's trademark is prominently displayed, genuine parts are advertised, and parts and service representatives wear uniforms with trademarks on them. The intention is to convey the message that this is an "authorized dealer" who services and repairs the cars he sells to meet "factory standards" through "factory-trained technicians" using "genuine parts." This message encourages vigorous interbrand competition by nurturing the public image that those who come to the dealer for new cars, service, or repairs will get the real thing. As this Court observed in *GTE Sylvania*:

> "[N]ew manufacturers and manufacturers entering new markets can use [vertical, non-price] restrictions in order to induce competent and aggressive retailers to make the kind

---

[4] Parallel citations to advance sheets, and denials of certiorari, appear in the Index of Authorities, *ante*, and are not repeated in textual citations. All emphasis in quoted materials has been added, unless otherwise noted.

of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's good will and the competitiveness of his product. Because of market imperfections such as the so-called 'free rider' effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did. Posner, *supra*, n. 13 at 285" (433 U.S. at 55).[5]

Putting it all together, economist George Stigler testified at the trial of this case:

"If I have 3,000 franchises or 400, as in this case, and I let each of them do what he wants, some of them could do what we call free riding. They could cut back on their services, they would be shabby in the maintenance or repair department or something like that or use cheap parts. And the effect would be not only for them to lose business, but for the name of the product to get a bad name so that other people would lose, too, and so that the problem in a franchise system is, on the one hand, to maintain that uniformity of quality that you want to be the insurance and a big factor in selling and, on the other hand, maintain that stimulus on the part of the individual owners of the franchises who work hard and diligently.

"And so you have a set of controls, and every franchise agreement will give the franchisor the right to inspect the

---

[5] The Court's citation was to R. Posner, *Antitrust Policy and the Supreme Court: An Analysis of Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282 (1974). He is one of many Chicagoans upon whom aspersions are cast in the Petition.

property, to insist that it has certain things like in the case of an automobile a repair section, a display section, that it keeps records in a certain way so that you know things are done properly. To assure that the mechanics, for example, had gone through a proper training course for the handling of that car.

"And you go down the line, and the maintenance of that quality is the important thing that allows a national system to be decentralized and to get advantages of both a big national planning and standardization and the local entrepeneur, who is living his own life, and if he is doing it right, doing it very well." (RT 26-136 and 137).

For these reasons, each of MBNA's dealers enters into a franchise agreement with MBNA containing many standard provisions, including Paragraph 9C, which reads:

> "Dealer shall neither sell nor offer to sell for use in connection with MB passenger cars nor use in the repair or servicing of MB passenger cars any parts other than genuine MB parts or parts expressly approved by Daimler-Benz if such parts are necessary to the mechanical operation of such MB passenger cars."[6]

The evidence at trial confirmed that Paragraph 9C does not work against the interest of consumers. As would be expected, consumers who took their Mercedes-Benz automobiles to authorized Mercedes-Benz dealers for repairs expected and desired that the dealers would install genuine Mercedes-Benz parts. No evidence even suggested that any consumer who patronized a Mercedes-Benz dealer expected or requested the dealer to use parts supplied by another company. Consumers consciously preferred genuine parts supplied by MBNA and backed by its warranty, and patronized dealers precisely to obtain the real thing. Those

---

[6] The district court decided, and the jury was instructed, that this clause precluded dealers from buying mechanically necessary replacement parts for Mercedes-Benz automobiles from sources other than MBNA, even though the evidence was that some "free-riding" dealers cheerfully ignored this "obligation" whenever they pleased.

consumers (if any) who consciously preferred to purchase parts supplied by companies other than Daimler-Benz and MBNA were free to obtain them at the hundreds of independent garages and repair facilities in every metropolitan community, many of which advertise themselves as specialists in the repair of Mercedes-Benz automobiles.[7]

MBNA purchases the great bulk (80%) of its replacement parts from its parent, Daimler-Benz, which manufactures about half the parts used in Mercedes-Benz automobiles. Daimler-Benz purchases the other half from German original equipment manufacturers (OEM's) who undertake to comply with its specifications. But the mere undertaking to comply with specifications is not enough to satisfy Daimler-Benz. All replacement parts manufactured or purchased by Daimler-Benz undergo rigid and exhaustive quality control inspections and procedures. Daimler-Benz removes a predetermined number of parts at random from each shipment of parts and subjects those samples to stringent testing. If a sample part fails the inspection process, the entire shipment is rejected. During the time period at issue in this suit, Daimler-Benz annually rejected an average of more than 40,000 shipments of parts from OEM suppliers for quality reasons. (RT 19-23 to 73). MBNA purchases the remaining 20% of its replacement parts directly from the same German OEM manufacturers that supply parts to Daimler-Benz. Although these parts do not undergo Daimler-Benz's quality control examination in Germany, many are tested by MBNA itself, and others are built to its more exacting specifications, which the OEM's do not follow in producing parts for sale to distributors other than MBNA. (RT 31-13 to 25).[8] And without exception, each part supplied by MBNA was covered by its nationwide consumer warranty.

---

[7] *E.g.*, RT 19-93 & 94; 21-86 & 87; 31-156 to 174; 38-38 to 104. Accordingly, petitioner's report of the imminent death of an entire industry (Pet. 7) is greatly exaggerated.

[8] Thus, only noncritical parts such as windshield wiper blades, radios, and batteries are exempt from the rigorous quality control procedures, and these represent less than 5% of the parts sold by MBNA. *Ibid.*

The MBNA franchise system has proven its effectiveness in the marketplace. When originally established in 1965, MBNA sold only 12,000 cars per year, representing one-tenth of one percent (0.1%) of the United States automobile market. MBNA currently sells approximately 90,000 cars annually (0.9%), and the quality related services at its dealers are critical to this success. "The German and Japanese used good service as a primary weapon in their initial competition against U.S. automobile manufacturers. The Americans did not treat their customers with similar respect: The burden of repair, often not very successful repair, seemed to fall on the customer." T. Piraino, *supra*, at 21. It was in this setting that the jury was asked to decide whether MBNA had a valid "business justification" for its exclusive dealing arrangement with dealers, and the jury found that the arrangement was *"the only way the safety and quality of MB cars can be assured."*[9]

3. The Generic Parts Business of John Mozart

Independent jobbers of auto parts have been around a long time, *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7 Cir. 1935), *aff'd mem.*, 299 U.S. 3 (1936). One such firm was "Eurasian," a San Francisco parts jobber owned by John Mozart.[10] Although Mozart specialized in BMW parts, he also sold some parts for Mercedes-Benz automobiles. At trial, Mozart boasted that his parts were "as good as" genuine Mercedes-Benz replacement parts sold by MBNA, but the evidence failed to substantiate this claim. As the court of appeals noted:

> "There was considerable testimony by dealers and employees of MBNA about the inferiority of parts supplied by independent jobbers. Although Mozart introduced evidence to the

---

[9] The quoted phrase was the nub of the instruction prepared by petitioner and given at his insistence by the district judge (App. A to Pet., p. A-15 & n. 7). The court of appeals correctly brushed aside petitioner's effort to challenge his own instruction on appeal. *Ibid.*

[10] The nominal petitioner is The Mozart Company, a Cayman Islands corporation owned by John Mozart, to whom he assigned the claims against MBNA before trial. See Pet. 2 n. 1. Accordingly, the real petitioner is Mr. Mozart, and we sometimes refer to petitioner as such.

contrary, the jury was entitled to make credibility determinations in favor of MBNA. We hold that there was ample evidence to support a finding that the tying arrangement is a legitimate means of maintaining the quality of Mercedes replacement parts supplied by dealers, and thereby protecting the reputation of the MBNA product." (App. A to Pet., p. A-16).

Mozart's own trial testimony exploded the myth of "equal quality." He testified that he knew nothing of the specifications of Daimler-Benz, and neither tested nor otherwise assured even himself that the parts he sold met those specifications. (RT 3-106-107; 38-190).[11] Unable to assure equal quality, Mozart sold parts to dealers by emphasizing the greater profit that could be made by substituting his cheaper parts for those of MBNA, whilst charging consumers the same retail prices (RT 5-55 to 76) Cf., *Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 529-31 (1924); *Krehl v. Baskin Robbins Ice Cream Co.*, 664 F.2d 1348, 1354 n. 15 (9 Cir. 1982); *Klamath Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1289 n. 14 (9 Cir. 1983).

4. Proceedings Below, Before Trial

In 1979, Mozart sold his business for a $6 million gain, but as past profits from the sale of replacement parts for Mercedes-Benz automobiles had not been large, he "decided to try antitrust laws as a means of shifting his losses to someone else." *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1355 (9 Cir. 1976). Mozart complained to the United States Department of Justice, which then sued MBNA on the theory that Paragraph 9C of the dealer agreement was unlawful *per se* under Section 1 of the Sherman Act, 15 U.S.C. § 1. In 1981, the district court denied the government's motion for summary judgment, *United States v. Mercedes-Benz of North America, Inc.*, 517 F.Supp. 1369, 1384-88 (N.D. Cal. 1981,

---

[11] The quality of Mozart's parts was made concrete for the jury by evidence that Daimler-Benz had itself tested "reverse-engineered" brake discs sold by Mozart, which not only failed to meet the specifications of Daimler-Benz, but were so poorly designed and manufactured as to be downright dangerous. (RT 20-4 to 46).

Patel, D.J.). After due consideration, the government dismissed the action, advising the court that "tying arrangements of the sort involved in this case do not harm competition by creating market power, but merely allow firms to capture, in a particular way, the value of customer preference for a particular brand or trade name."[12]

Meanwhile, before the government dismissed, three private treble-damage actions by auto parts jobbers were brought against MBNA. The first plaintiff was a New Jersey firm, International Auto Parts ("IAP"), which brought a class action on behalf of all jobbers of replacement parts for Mercedes-Benz automobiles. Next filed was the *Metrix* case in the District of Maryland, discussed in Part III of the opinion of the court of appeals below (App. A to Pet., pp. A-8 through A-11), and in which this Court just recently denied certiorari from an interlocutory ruling of the Fourth Circuit, *Metrix Warehouse, Inc. v. Daimler-Benz AG and MBNA,* 828 F.2d 1033 (4 Cir. 1987), *cert. denied,* 108 S.Ct. 1753 (1988).

When Mozart sued in 1981, MBNA moved to transfer the case to New Jersey for consolidation with IAP's putative class action. Mozart persuaded the district court that transfer would be "inconvenient" for him, but MBNA's motion was denied without prejudice to its renewal in the event that *IAP* moved along. To forestall that possibility, Mozart's counsel wrote the district judge in New Jersey, urging him *not* to certify the *IAP* case as a class action. Mozart's efforts to avoid consolidation were fortunate indeed, for in due course summary judgments were entered in favor of MBNA both in *IAP, Inc. v. Mercedes-Benz of North America, Inc.,* 571 F.Supp. 262 (D.N.J. 1983), and in *Metrix Warehouse, Inc. v. Daimler-Benz AG and Mercedes-Benz of*

---

[12] See *United States v. Mercedes-Benz of North America, Inc.,* 547 F.Supp. 399 (N.D. Cal. 1982). The quoted language appears in a Department of Justice release, March 15, 1982, submitted to the district judge on the occasion of the government's decision to dismiss. The release appears in full text as an Appendix to this Brief in Opposition, pp. A-1 to A-2, *post.*

North America, Inc., 1984-1 Trade Cases (CCH) ¶ 65,766 (D.Md. 1983).

In late 1984, however, the prospect of separate trials on both coasts arose again, when Senior Judge Edward Northrop reversed himself, and reinstated Metrix's action against MBNA. *Metrix Warehouse, Inc. v. Daimler Benz AG, et al.*, 1984-2 Trade Cases (CCH) ¶ 66,226 (D.Md. 1984). MBNA then sought consolidation for trial, either in Baltimore or San Francisco, but Mozart again wanted no part of any consolidated trial. Judge Northrop was of the view that the different facts of each case would make a single trial unmanageable, even though Judge Patel in San Francisco believed that she could handle the problem. Thus, when both judges reluctantly concluded that a single trial would not be held, Mozart's counsel crowed that his efforts to resist consolidation might soon bring him the reward of "offensive collateral estoppel." (p. 25, *post*).

Although the jury did return a verdict for Metrix, upon learning that Judge Northrop had ordered a new trial on damages, Judge Patel in San Francisco wisely exercised her discretion in favor of trying the *Mozart* case in full, without partial offensive collateral estoppel.

5. The Full Trial in San Francisco, and the Plenary Appeal

Mozart's case thus went to trial on all issues in San Francisco, beginning in August 1985 and concluding eleven weeks later. And Mozart lost. That is the simple unvarnished truth of the matter, which Mozart has persisted in denying ever since the verdict came in against him. The form of verdict submitted to the jury contained a series of questions. (See App. E to Pet., pp. A-52 through A-53). The first two questions asked the jury to decide whether MBNA had "violated" Section 1 of the Sherman Act "under the per se test," or "under the rule of reason test," respectively, and the jury answered "Yes" to each. As the court of appeals determined, however, the instructions on market power that lead to those "Yes" answers were fatally flawed (App. A to Pet., pp. A-4 through A-8). Accordingly, everything Mozart now

claims for those two answers disappears from the case. Question Three was:

> "Do you find that there was a business justification for the conduct which you have found violated Section 1? . . . If you have answered 'yes' to Question Three, stop here and do not answer any other questions."

The jury answered "Yes" to Question 3, and stopped as it was told. Although Questions One and Two, to which "Yes" answers were given, included the word "violation," the district judge explained in her instructions that this was technically incorrect. Thus:

> "Now, I have used the language in Questions One and Two, 'violation of Section 1.' Technically, there is *no violation* if, in fact, there has been a per se violation or rule of reason violation, but there is a business justification; in other words, that completes the whole analysis. And if you find that there is a business justification that's been established by the defendant, *then there is no violation*." (RT 41-232 & 233).

That is exactly what the jury found, and when the district judge received the verdict, she said:

> "Therefore, there is finally and ultimately *no violation* of Section 1, either under the rule of reason or per se . . . . There was finally *no violation* of Section 1 because there was a business justification." (RT Oct. 29, 1985, p. 4).

This should set to rest the canard that Mozart has been retelling, i.e., that he actually "won" and was deprived of his victory by some wanton and freakish procedure (Pet. 5). As the court of appeals explained, the district judge "untangled matters" by determining, in accordance with her instructions, that the finding of a business justification negated the existence of any "violation" of Section 1. (App. A to Pet., p. A-4). The court of appeals then affirmed the jury's verdict on business justification, held that the "Yes" answers to Questions One and Two were flawed by errors in instructions on "market power," and declined to allow Mozart to recycle his loss, either by reference to other

antitrust laws, or by the device of "offensive collateral estoppel." To each of these matters we now briefly turn.

REASONS FOR DENYING THE WRIT

There is nothing in the present petition which can be taken seriously as a claim to have met the threshold requirements for a writ of certiorari. Petitioner gives lip service to *Jefferson Parish* and *Business Electronics* but his major reliance is upon a misreading of *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949), and upon *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (Cir. 1984), which petitioner—but not the court of appeals—sees as a "conflicting" decision. In short, petitioner's entire submission necessarily depends upon ignoring a whole body of law developed over the last dozen years, refining and giving fresh rationality to antitrust, and especially to the law of vertical non-price restraints. He deserves a hearing only if this Court is prepared to consider overruling *GTE Sylvania* and everything else that has built upon *GTE Sylvania*.

Beyond this, all of petitioner's arguments are bound up in the facts of this case. On "liability," the jury found the facts against him, and on "collateral estoppel," the petition is no more than a plea that this Court substitute its discretion *de novo* for that exercised by both courts below. Thus, Mozart's claim of "conflict" with the decision of the Fourth Circuit in *Metrix* is really no more than a stalking horse for his disagreement with the Ninth Circuit's determination that the cases were quite different in fact and law. (App. A to Pet., pp. A-8 through A-11).

A. The Business Justification Defense Under Section 1 of the Sherman Act

1. Petitioner's Misunderstanding of the Jury's Verdict

Petitioner continues to insist, as he did below, that the jury found that MBNA had "violated" the Sherman Act (Pet. 5). But what petitioner insists never happened. The jury was clearly told by the district court that if it found a business justification for the restraint, "*then there is no violation.*" (p. 12, *ante*). And the jury so found, on instructions prepared by petitioner himself and given

at his insistence. After the verdict was returned, the district judge, who had heard eleven weeks of testimony, denied Mozart's motion for judgment NOV with the comment that the verdict for MBNA was supported by "substantial" *and* "persuasive" evidence. (RT Feb. 10, 1986, p. 2). And the court of appeals quite agreed.

In truth, "business justification" is simply another phrase for familiar rule of reason analysis. One who desires a *per se* rule must prove that the challenged practice is a commercial obscenity—a naked restraint without *any* redeeming business virtue. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8, 20 (1979). A plaintiff who invokes the rule of reason must prove that the "business justification" for the arrangement, i.e., its legitimate commercial virtues, are nevertheless outweighed by other considerations, e.g., *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 113-120 (1984), *Jefferson Parish, supra*, 466 U.S. at 29-31; *Business Electronics, supra*, 108 S.Ct. at 1519-1525. All the Justices who subscribed to the opinions in *Business Electronics* recognized fundamental principles of antitrust law that the present petition omits. As "business justification" and "reasonableness" are virtually synonymous, it follows that they are part of the entire fabric of antitrust, not only under Section 1, but also under Section 2, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-12 (1985). As the court of appeals summed up (App. A to Pet., p. A-12, n. 5):

> "It may seem somewhat anomalous to permit justifications for arrangements that are apparently subject to per se condemnation. However, per se rules are simply examples of presumptions that exist throughout antitrust law, and 'easy labels do not always supply ready answers.' *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 8 (1979). Before applying the per se label we must determine whether the challenged practice is one of those types that is 'plainly anticompetitive' and very likely without 'redeeming virtue.' *Id.* at 9. Allowing the defendant to assert a business justification defense is one way of inquiring into whether the reasons

for the relatively categorical historical condemnation of tie-ins apply to the challenged arrangements."[13]

2. That Toddlin' Town . . . the Trial Testimony of Professors Stigler and Brozen of Chicago

Mozart's *ad hominem* comments about present and former professors of the University of Chicago (Pet. 3, 8, 24) is reminiscent of the petition for rehearing rejected in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 802 F.2d 217, 219 (7 Cir. 1986; Flaum, J., concurring). But even worse, the Petition here is an ill-disguised attack upon the credibility of two trial witnesses, economists George Stigler and Yale Brozen of Chicago. In a way, their testimony sets this case apart from garden-variety antitrust litigation, for the issues of economics were not left to decision on the basis of passages selected from the literature. The economic experts were there; they presented their opinions from the witness stand, were subjected to cross-examination by experienced and pertinacious counsel, and no opinions to the contrary were offered by petitioner. Dr. Stigler provided substance and detail to some of the ideas shared by both law and economics that were adumbrated by this Court in *GTE Sylvania* (pp. 4-6, *ante*). On cross-examination, counsel for petitioner went to the heart of the matter. Employing a question written out in advance so as to include the exact words of petitioner's proposed jury instruction (which the district court later gave), his counsel asked:

> Q [by Mr. Lasky]: And are you qualified to say, do you have any expertise that qualifies you to say whether the tying arrangement was the only way the safety and quality of Mercedes-Benz could be *assured*?

No stranger to major league pitching, Dr. Stigler calmly hit a home run with this exchange:

---

[13] More recently, Dr. Betty Bock made the same essential point that business justification is a part of the fabric of all of antitrust. See B. Bock, *Business Judgment in Antitrust: The Role of a Valid Business Rationale in Modern Antitrust Jurisprudence*, 55 Antitrust & Trade Reg. Rep. (BNA) 109 (July 21, 1988), quoted at p. 22, *post*.

"A [by Dr. Stigler]: It seems to me that a method of *insuring*, not requesting the obtaining of good parts by the dealers, invariably required more than merely a statement that the dealers be instructed to buy products of equal quality. . . .[14]

"Q: Doesn't it follow that the dealer would not use inferior parts?

"A: I believe you did not understand my qualification. From the viewpoint of all dealers combined, the maintenance of this high quality product was much to be desired because it was very well justified by consumers' reliance upon and desire for the product. From the viewpoint of any one dealer, the use of cheaper parts and, let's say, higher frequency of repair problems and so forth and so on, would be incurred in part by him—the consequences of that. But many of the consequences would fall on the car's image in general. That's why franchise agreements insist on quality across the board.

"Q: Take dealers as a whole then, a population of dealers. Your answer to my question is that the dealer would not use inferior parts?

"A: If there were no free rider—if all the dealers were one company, I agree with what you said.

"Q: If you get 400 of them?

"A: Then any one has individual interests that conflict with those of a group as a whole . . . The logic is very simple. If any one wheat farmer produces more wheat and that lowers the price for everybody, that has a negligible effect on him, but it has a substantial influence upon all wheat farmers combined; that is, joint actions by everybody together are different from the individual inducement to, say, an individual firm.

---

[14] As petitioner does not like Chicagoans, we may be forgiven for suggesting that WGN's mellifluous Harry Caray might have called the action in court this way: "Stigler hit it clear into Waveland Avenue. Holy cow!"

"Q: Doesn't it really come to this, Dr. Stigler: Unless you assume the dealers as a whole were rather stupid, no agreement like 9C was necessary to protect the quality of the parts?

"A: I'm sorry we don't communicate better, Mr. Lasky. I have said if all the dealers were unified in one firm, what you say would be exactly true. As long as each is an independent economic organization, any one dealer who, at a substantial saving to himself, could get parts that had higher consequences of damage and the like would be perhaps rewarded for doing so because he would bear only a small portion of the cost, and the general reputation for less reliability would fall on the car in general.

"Q: So what you're really saying is, aren't you, that because there may be the occasional stupid man or the occasional reprobate, that would justify a broad tying agreement that restricts what the dealers can do by contracts; is that what you are saying?

"A: No, sir. These individual interests could be held by people who go to church as often as anyone else. Their self-interest would be to have this problem of the free rider. And that's why every franchise agreement of a national system has a serious concern with the maintenance of quality. It's because the individual inducements are not the same as the aggregate inducements." (RT. 27-18 to 23; colloquy omitted).

Dr. Yale Brozen in his turn brought to bear the experience and insight of one who has spent many years studying the economics of automobile distributors and the franchise system. He testified as an expert (as many dealers echoed intuitively) that consumers demand and expect genuine parts when they bring their cars to a franchised dealer for service and repair; that this choice is made in advance, and is expressed by the very fact of coming to the dealership.[15] And, despite the fact of FTC orders entered decades

---

[15] See, also, *Klamath Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau, supra*, 701 F.2d at 1289 n. 14.

ago against General Motors, all franchisors require dealers to maintain stocks of "genuine parts" sufficient to meet consumer demand for genuine parts. And Dr. Brozen went on to testify that, in practical effect, the "genuine parts" clauses of GM, Ford, and Chrysler are no different from Paragraph 9C of the Mercedes-Benz Dealer Agreement. This is so because the evidence established beyond peradventure that there was no demand for Mozart's parts by anyone who ever patronized a Mercedes dealership. (RT 38-24 to 117).

3. Less Restrictive Alternatives

Little need be said about petitioner's argument about "less restrictive alternatives." Seizing upon dictum in Justice Frankfurter's 1949 opinion in *Standard Oil, supra,* 337 U.S. at 293, Mozart argues that the only acceptable alternative is "inability" to furnish specifications in the abstract. This effort to stop the clock and arrest the development of antitrust principles at 1949 is the kind of schizoid thinking to which this Court so recently adverted in *Business Electronics, supra,* 108 S.Ct. at 1523-24.[16] Moreover, the remark in *Standard Oil* was made with reference to tying arrangements fastened upon consumers or other end-users, not exclusive dealing arrangements between manufacturer and retailer, and had as its particular reference *International Business Machines Corp. v. United States,* 298 U.S. 131, 139 (1936), where this Court affirmed a finding that specifications were not only published and available, but meticulously followed by all

Here, petitioner's argument is also exploded by uncontradicted expert and lay testimony that the alternative would be valueless unless accompanied by extensive, expensive testing of all parts supposedly manufactured pursuant to the specifications. Pertinent is a conversation between Glendower and Hotspur, recorded in the history of *King Henry IV, First Part*:

---

[16] In *GTE Sylvania, supra,* 433 U.S. at 58 n. 29, this Court questioned whether evalution of "alternatives" was even an appropriate part of the analysis of vertical non-price restraints. See R. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,* 45 U. Chi. L. Rev. 1, 10-12 (1977).

"*Glen.* I can call spirits from the vasty deep.

"*Hot.* Why, so can I, or so can any man; but will they come when you do call for them?" (Act III, Sc. 1, 53-55).

One can furnish reams of specifications, but will the Mozarts of this world meticulously follow them? No one can tell without testing the parts to see if they conform to the specifications. As already seen, Mozart did not bother to acquaint himself with any specifications, and took no steps to assure himself, much less his customers, that any specifications had been followed. The elaborate quality control system established by Daimler-Benz is unmatched in the industry, which sets this case poles apart from *In the Matter of General Motors Corp.* 34 F.T.C. 58 (1941). There, GM's exclusive dealing arrangements extended to 30,000 individual dealers *and* independent repair shops. The evidence was that GM and independent jobbers purchased all their parts from the same manufacturers, that the parts purchased by each were "identical in quality and design," and that GM merely repackaged those generic parts in boxes bearing its own trademark. 34 F.T.C. at 81. Here, the evidence was altogether different.

The instructions directed the jury to determine whether various alternatives would nevertheless "assure" that the products were in all respects equal in quality to those of Daimler-Benz and MBNA. Most of Mozart's fancied "alternatives" were not even the subject of evidence, but were placed before the jury in the arguments of his counsel.[17] After the jury rejected all of them, Mozart on appeal thought of a new one, arguing that Daimler-Benz was obligated to provide *gratis* testing and certification of each part that Mozart wished to purchase and resell. Judge Sneed for the Ninth Circuit adequately responded to this by saying:

"We do not believe MBNA was required as a matter of law to take such extreme steps to protect its legitimate interest in

---

[17] See *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249-50 (3 Cir. 1975) ("Entrepreneurs . . . would be made guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade.").

insuring public confidence in the quality of its trademarked product. There is substantial evidence to support the jury's finding that the only feasible method for maintaining quality control is the use of the tying arrangement." (App. A to Pet., p. A-17).

4. No Conflict Exists Between This Case and Metrix

The evidence presented at trial, and the legal rules given to the jury in instructions prepared by Mozart, were also quite unlike anything in the *Metrix* case.[18] In *Metrix*, the jury was instructed that MBNA could not prevail upon its business justification unless it could prove "that parts of like quality *cannot be produced* because specifications cannot be practically or feasibly provided." (*Metrix* Tr. 4341). That instruction precluded the possibility of any thoughtful and pragmatic consideration by the jury of the distinction between specifications in the abstract and arrangements necessary to *assure* that specifications have been followed. Having decided early on to give that instruction, the district judge in the *Metrix* case was unwilling to allow MBNA to present the kind of evidence of practical reality that was presented at the trial of the *Mozart* case. Since the *Metrix* case was tried first, Mozart's counsel knew of both the prior instruction and its sharp confinement of the evidence at trial, but wanted no part of either. This explains much of his anxiety about collateral estoppel, for having participated in a trial in which a more thoughtful examination of the subject was conducted, both through the evidence and in the instructions, Mozart now wishes to avoid the verdict returned against him.

Just a few months ago, this Court denied certiorari in the *Metrix* case, despite the substantial argument that MBNA had been prejudiced, both by these errors at trial, and especially by the erroneous *post hoc* legal standard on appeal, in which the Fourth Circuit largely ignored the instructions, and affirmed the verdict upon theories and evidence that the jury was never permitted to explore.

---

[18] *Metrix Warehouse, Inc. v. Daimler-Benz AG and Mercedes-Benz of North America, Inc.*, 828 F.2d 1033 (4 Cir. 1987), *cert. denied*, 108 S.Ct. 1753 (1988).

As there was no occasion to grant certiorari in *Metrix*, there is even less reason to do so now. If entrepreneurs must guarantee that the imaginations of lawyers (and judges) cannot conjure up less restrictive alternatives, *American Motor Inns, Inc. v. Holiday Inns, Inc., supra,* 521 F.2d at 1249, they should at least be given an opportunity to do so before the jury. The "conflict" (if any) is not between the decisions of the Fourth and Ninth Circuits, but between the jury's resolution of the facts here, and the Fourth Circuit's suppositions as to what a jury in the *Metrix* case might have found on a different record.

As well, *Metrix* is far from final. A new trial on damages has been ordered, and the Fourth Circuit has yet to review the "market power" instructions which were largely the same as those given but disapproved here. When the case returns to the Fourth Circuit after trial, that court will doubtless examine the entire case with the benefit of the views expressed by the Ninth Circuit here. If at that time any "conflict" exists, this Court can resolve it as need be.

B. The Claims Under Section 2 of the Sherman Act and Section 3 of the Clayton Act

Petitioner's assertion that "business justification" is unknown to the law of monopolization (Pet. 18) borders on the frivolous. The court of appeals properly dispensed with this implausible assertion in four sentences. It would be a contradiction in terms to reach the conclusion (as the jury did) that the arrangement was "the only way the safety and quality of MBNA's products can be assured," and simultaneously brand the contractual provision as a tool of monopolization. Curiously, petitioner does not even cite *Aspen Skiing, supra,* where only two terms ago, this Court devoted many pages to the subject of "*Ski Co.'s Business Justification*" as a defense to the charge of monopolization. (472 U.S. at 608-12).[19]

---

[19] The petition's omission of reference to *Aspen Skiing* calls to mind the observation of Sir Walter Scott about a London playbill "which is said to have announced the tragedy of Hamlet, the character of the Prince of Denmark being left out." W. Scott, *The Talisman,* intro (1825).

With perfect consistency, other courts of appeals likewise view business justification as a defense under Section 2 of the Sherman Act (15 U.S.C. § 2), e.g., *Houser v. Fox Theatres Management Corp.*, 845 F.2d 1225, 1231 (3 Cir. 1988); *Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1185 (5 Cir. 1988); *Olympia Equipment Leasing Co. v Western Union Telegraph Co.*, 797 F.2d 370 (7 Cir. 1986). As Dr. Betty Bock recently observed:

> "In each of the monopoly cases, the courts found that the existence of a *valid business rationale* for allegedly monopolistic practices prevented the charge from holding. . . . When looking at the modern 'valid business justification' language, it is difficult to tell whether the courts are developing a new concept or are simply working out the implications of earlier concepts. I think the latter, because although the shift in explicit judicial focus has been sudden, dating from the *Aspen* and *Matsushita* decisions in 1985 and 1986, the underlying logic has been building since shortly after World War II, sometimes as dicta and sometimes as substance, in a series of major Supreme Court decisions. . . . [A] monopolization defense couched in valid business-reasons terms is, in my view, bottomed on the exceptions spelled out in *Alcoa* and carried forward in *Grinnell* suggesting that an enterprise that has displayed competitive vigor and operated efficiently with sound economic reasons for its conduct should not be turned upon when it is successful. It should be found to have been engaged in illegal monopolization only if it has reached and maintained a monopoly position through practices that themselves are prohibited."[20]

And the jury's verdict here was that the practice of MBNA *is not prohibited* by Section 1. Recycling the practice under Section 2 would be to no purpose, as both the trial judge and the court of appeals recognized.

Mozart's attempt to recycle his case under Section 3 of the Clayton Act (15 U.S.C. § 14) is equally unimpressive. Many of the cases he cites arose under that statute, among them *Interna-*

---

[20] B. Bock, *supra*, 55 ATRR at 114, 115 (1988), emphasis in original.

tional Business Machines Corp., supra, 298 U.S. at 131;[21] *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7 Cir. 1935), *aff'd mem.*, 299 U.S. 3 (1936); *In the Matter of General Motors Corp.*, 34 F.T.C. 58 (1941); and *Standard Oil, supra*, 337 U.S. at 293.

In *Standard Oil*, this Court was unanimous in holding that the many positive virtues of exclusive dealing arrangements prohibited *per se* condemnation. The Justices then divided 5-4 over the relative virtues of the arrangement in that particular case, which was imposed by the dominant producer in the marketplace. Even this was too much for Justices Douglas and Jackson, whose dissenting opinions are the precursors of antitrust views developed in and since *GTE Sylvania*. Justice Douglas argued that vertical exclusive dealing arrangements preserve the independence of retailers and blunt the drive of cartels toward forward vertical integration. 337 U.S. at 315. Justice Jackson, the author of *International Salt Co. v. United States*, 332 U.S. 392 (1947), minced few words:

> "The government can derive no comfort for this sort of thing from *International Salt*. There the defendant started with a patent monopoly of the machine for utilization of its product. The customers, canners, were in effect the ultimate consumers of salt as such." 337 U.S. at 324 n. 1.

But where consumer choices are not foreclosed, Justice Jackson correctly observed that an exclusive dealing arrangement cannot possibly work against the interests of consumers, or against any other interest protected by the antitrust laws:

> "Many contracts have the effect of taking a purchaser out of the market for goods he already has bought or contracted to take. But the retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate

---

[21] In *IBM*, this Court affirmed the trial court's finding that IBM had not established a business justification for its practice, 298 U.S. at 139. Here, the jury found just the reverse, and the court of appeals affirmed that finding.

> consumer—the man in whose automobile the gas is used. It means to me, if I must decide without evidence, that these contracts are an almost necessary means to maintain this all-important competition for consumer business, in which it is admitted competition is keen. The retail stations, whether independent or company-owned, are the instrumentalities through which competition for this ultimate market is waged." (337 U.S. at 323).

The Court returned to these themes in *GTE Sylvania*. Footnote 26 of that opinion (433 U.S. at 57) captures the essence of Justice Douglas' *Standard Oil* dissent, and the conclusion that non-price vertical restraints promote competition and the interests of consumer welfare gave fresh meaning to the views expressed by Justice Jackson. That is why the proper focus is upon the arrangement's effect—if any—upon consumers. *Jefferson Parish, supra,* 466 U.S. at 18, 24-29; R. Posner, *supra,* 45 U. Chi. L. Rev. at 10-12. It is pure schizophrenia to argue (Pet. 11-12) that in Section 1, Congress intended to protect consumer welfare, but in Section 3 it did not.

C. Offensive Collateral Estoppel

Nearly a decade ago, this Court crisply guided federal courts in their use of offensive collateral estoppel, *Parklane Hosiery Co. v. Shore, supra,* 439 U.S. at 331:

> "We have concluded that the preferable approach for dealing with these problems of offensive collateral estoppel in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied."

Mozart had an eleven-week jury trial and lost. In the exercise of discretion, the district court preferred a full trial. Now, Mozart asks to be relieved of the jury's verdict against him based upon a partial, interlocutory adjudication against MBNA on the issue of business justification as it arose in the *Metrix* case.

With only fleeting reference to *Parklane,* petitioner heaps up *defensive* estoppel cases as if they conferred some automatic right to *offensive* estoppel. But *Parklane* strikes a different balance,

confining offensive use of the doctrine to those few instances in which, as a matter of sound discretion, further proceedings would be an unconscionable waste of judicial resources. Certiorari is reserved for better purposes than to revisit discretion twice exercised below.

In *Parklane*, this Court identified several specific situations in which the "general rule . . . should not allow the use of offensive collateral estoppel," and each is present here. They are (1) "where a plaintiff could easily have joined in the earlier action," or (2) where "the judgment relied upon . . . is itself inconsistent with one or more previous judgments in favor of the defendant," or (3) where "for other reasons, the application of offensive collateral estoppel would be unfair to the defendant." 439 U.S. at 330-31.

For reasons satisfactory to himself, petitioner fought consolidation of the *Metrix* and *Mozart* cases for trial, whether in Baltimore or in San Francisco, and persisted in demanding separate trials even when MBNA offered to defray some of Mozart's expenses of trying his case with Metrix in Baltimore. His counsel told the district court that consolidation with *Metrix* would have only "superficial appeal," and that "I don't believe it to be true that there is a great overlap of witnesses."[22] Then, having defeated consolidation with the result that Metrix was to be tried before his own case, petitioner's counsel smugly proclaimed:

> "MR. LASKY: If a verdict comes in for the [Metrix] plaintiff on that case on the liability, these people are out on collateral estoppel. . . ."[23]

There is more. Mozart wrote the jury instructions given to his jury on the issue—business justification—as to which he now claims collateral estoppel. These instructions varied materially from those given in *Metrix*. Mozart tried his case on the different theory expatiated in his instructions. He examined witnesses using

---

[22] RT Dec. 14, 1984, p. 68; RT Dec. 19, 1984, p. 3.

[23] RT Dec. 19, 1984, p. 13. Doubtless the same hope explains Mozart's earlier effort to resist consolidation with the *IAP* case in New Jersey (p. 10, *ante*).

the language of his own distinctive jury instructions and theories. When the Ninth Circuit observed that the cases were tried on "different evidentiary facts," it spoke of a difference Mozart created. (App. A to Pet., p. A-11). Having lost on his chosen instructions, Mozart now seeks an offensive collateral estoppel on different instructions which he never requested, but which he knew had been given in *Metrix*. This is not a demand for estoppel based upon identical cases, but a bald demand to jettison a plenary trial and the resulting verdict because petitioner's chosen course of conduct backfired.[24] No decision has ever sanctioned the use of offensive collateral estoppel as a safety net, and to permit petitioner to succeed would be to reward or to encourage the very behavior which gave this Court great pause in *Parklane*:

> "[O]ffensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely 'switching adversaries.' . . . Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by the judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. . . ." (439 U.S. at 329-30).

Still further, the outcome in *Metrix* is the aberration; the lone case in which MBNA did not prevail. That in itself justifies the conclusion that no legitimate purpose would be served by replacing the verdict of Mozart's jury with that of the *Metrix* jury, or by replacing the final determination of the Ninth Circuit with an

---

[24] The difference in fact between the *Mozart* and *Metrix* cases is far more significant than Mozart's ridicule of the Ninth Circuit would suggest. The *Metrix* verdict adjudicated liability for 1977 to 1981. Mozart's case related to 1975 to 1979. Mozart's motion for a collateral estoppel never sought a complete judgment of MBNA's antitrust liability, only liability for two years, 1977 to 1979. Mozart's case had to be tried for the years 1975 and 1976, and was, with the verdict for MBNA.

interlocutory decision of the Fourth. *Parklane, supra*, 439 U.S. at 330. Offensive collateral estoppel is both a doctrine of fairness and a tool of sound judicial management. One who loses a plenary trial and a full appeal does not come with very good grace in asking that all the efforts expended at his behest now be vacated in favor of still another trial and another appeal. As the court of appeals astutely noted, "issue preclusion in its affirmative form is not that expansive." (App. A to Pet., p. A-11).

In the end, however, the petition on this score is much ado about nothing. On issues unrelated to business justification—and specifically deferred by the Fourth Circuit for consideration on another day—the Ninth Circuit found that Mozart's jury could not have returned a verdict against MBNA, because of flawed instructions as to "market power." (App. A to Pet., pp. A-6 to A-8). To that subject we now return.

D. Of Digidyne and Intra-Circuit "Conflict"

Petitioner's concluding eulogy to the Ninth Circuit's prior opinion in *Digidyne v. Data General Corp.* (Pet. 24-26)[25] likewise invokes no principle to which Rule 17 is addressed. He begins by misstating MBNA's brief *amicus curiae* in support of the petition for certiorari in *Digidyne* (Pet. 4). What we *actually* said was that while *Digidyne* ultimately rested upon market power presumptions sometimes drawn from copyrights or patents, the opinion's loose language about "uniqueness" was troublesome outside the patent-copyright field. Therefore, we said that it would be unfortunate if this loose language ever spread to the field of franchised distribution of products under a trademark, because "every franchisor offers a package, each a little different from those of others in the field."[26] This Court denied the writ in *Digidyne*, but

---

[25] *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9 Cir. 1984), *cert. denied*, 473 U.S. 908 (1985; White, J., with Blackmun, J., dissenting).

[26] See Brief for MBNA as *Amicus Curiae* in *Digidyne* (No. 84-761 in this Court) at page 5. We said in that context that the decision "should be rooted out *before* it spreads to the field of franchised product distribution systems."

the Ninth Circuit understood our concern, *and dealt with it in the very case now at bar.* (App. A to Pet., pp. A-4 through A-8).

On petition for rehearing below, Mozart pitched the *intra-circuit* "conflict" between *Digidyne* and his own case. This impressed no one, least of all Circuit Judge Arthur Alarcon, who participated in both *Digidyne* and in *this* case. He perceived no "conflict," and neither did any other judge of the nation's largest and most diverse circuit, none of whom even asked that a vote be taken on the suggestion of rehearing *en banc.* (App. C to Pet., p. A-50). That should be the end of the matter, for the judges of a single court of appeals are presumed to know how to attend to their own internal affairs. *Wisniewski v. United States,* 353 U.S. 901, 902 (1957). But since petitioner's discussion draws attention to aspects of vertical restraint law other than business justification, a few words of reply are in order.

Mozart's praise of the products and reputation of Mercedes-Benz pleases us immensely, but takes him nowhere. He spent weeks proving the point at trial, but offered no evidence remotely suggesting that other automobile companies "are in some way *prevented* from offering" a comparable product "*if they so elected.*" *United States Steel Corp. v. Fortner Enterprises, Inc.,* 429 U.S. 610, 621-622 (1977).[27] That decision also demonstrates that Mozart's discussion of the "profitability" of dealer sales of Mercedes-Benz automobiles puts him out of court. Profitability (dealer margin between wholesale and resale price) is the cost that a manufacturer incurs to engage dealers to sell its products at retail. "Great dealer profitability" means a *supra-competitive* margin, and hence a sale to the dealer at a wholesale price less than the competitive minimum necessary to retain the dealer's patronage. As Dr. Brozen testified, selling automobiles to dealers at prices below the competitive minimum demonstrates the *absence* of market power, not the reverse. (RT 38-98 to 100).

---

[27] With not a little irony, Mozart told the court of appeals that he himself "emphasized the high reputation of the Mercedes car in support of the contention that MBNA had economic power," and that his evidence "*bedazzled*" the jury when it came to decide the question of business justification. (App. Op. Br. below, at p.27).

Selling automobiles at lower-than-competitive prices, along with replacement parts at "higher" prices (if that were the case), and being successful at that endeavor, simply demonstrates that the package is competitively attractive, *Jefferson Parish, supra,* 466 U.S. at 11-12, and is but this industry's equivalent of selling expensive homes through the medium of cheap financing, *Fortner II, supra,* 429 U.S. at 622.

Moreover, as Justice Jackson foretold in his *Standard Oil* dissent, where there is intense inter-brand competition, exclusive dealing agreements with retailers cannot possibly work against consumer welfare or conflict with any other legitimate goal of antitrust. No consumer was ever forced to purchase a genuine Mercedes-Benz part, much less to purchase it under circumstances where the consumer might have preferred to purchase a substitute part from Mozart or anyone else. Any Mercedes-Benz owner who consciously preferred a "Mozart-brand" part was free to obtain it at any of the hundreds of independent automotive repair establishments in every metropolitan community, just as every surgical patient who consciously preferred gas given by Dr. Hyde, rather than by Dr. Roux, was free to undergo the knife at one of the other hospitals in New Orleans. *Jefferson Parish, supra,* 466 U.S. at 24-29. But unlike *Jefferson Parish,* there is no occasion here to speculate about the desires of consumers who patronized Mercedes-Benz dealerships. The evidence established that consumers chose franchised dealership repairs with the expectation and for the reason of obtaining genuine parts supplied and guaranteed by MBNA and Daimler-Benz.

Finally, non-price exclusive dealing arrangements with retailers have no capacity to facilitate "cartelization" or restrict output, *Business Electronics, supra,* 108 S.Ct. at 1520-21; *NCAA v. Board of Regents, supra,* 468 U.S. at 98-104. Arrangements of the kind involved in the present case are ancillary and pro-competitive in the pure sense described by Justice Stevens in his dissenting opinion in *Business Electronics, supra,* 108 S.Ct. at 1527-28:

> "The term 'vertical nonprice restraint,' as used in Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), and similar cases, refers to contractual terms that a dealer must accept in order to qualify for a franchise. Typically, the

dealer must agree to meet certain standards in its advertising, promotion, product display, and provision of repair and maintenance services in order to protect the good will of the manufacturer's product. . . . Restrictions of that kind, which are a part of, or ancillary to the basic franchise agreement, are perfectly lawful unless 'the rule of reason' is violated. Although vertical nonprice restrictions may have some adverse effect upon competition, so long as they serve the main purpose of a procompetitive distribution agreement, the ancillary restraints may be defended under the rule of reason. And, of course, a dealer who violates such a restraint may properly be terminated by the manufacturer."

Here, the jury addressed the rule of reason under the label "business justification." Although the court of appeals therefore found it unnecessary to speak to all aspects of market power, ancillary restraints, lack of consumer forcing, and the like, its reasoning in affirming the verdict is faultless.

CONCLUSION

This is a fact-bound case that—absent the district judge's misunderstanding of market power and related concepts—would not have reached the jury. But it did, and petitioner lost. The petition for certiorari should be denied.

DATED: San Francisco, California
August 22, 1988.

Respectfully submitted,

GEORGE A. CUMMING, JR.
Counsel of Record

MALCOLM T. DUNGAN
DARRYL L. SNIDER
THOMAS M. PETERSON
Attorneys for Respondent

Of Counsel:
ALLAN G. FREUND
WAYNE H. SAMSON

Appendix

DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE AT
MONDAY, MARCH 15, 1982 202-633-2007

The Department of Justice today dismissed without prejudice a civil antitrust suit against Mercedes-Benz of North America, Inc. (MBNA), of Montvale, New Jersey, the exclusive distributor of Mercedes-Benz automobiles in the United States.

MBNA is a wholly owned subsidiary of Daimler-Benz, A.G., the West German company that manufactures the cars.

The complaint, filed August 15, 1979, in the U.S. District Court in San Francisco, alleged that MBNA conditioned the sale of Mercedes-Benz automobiles to its dealers on the dealers' purchase of replacement parts from MBNA, in violation of Section 1 of the Sherman Act.

Assistant Attorney General William F. Baxter, in charge of the Antitrust Division, said he had concluded, after a thorough review of the case, that the "tying" arrangement involved did not have anti-competitive effects in the luxury passenger car market.

Baxter said that tying arrangements of the sort involved in this case do not harm competition by creating market power. Instead, they merely allow firms to capture, in a particular way, the value of customer preference for the particular brand or trade name, he said.

"Were the arrangement to be prohibited," Baxter said, "the manufacturer could, and probably would, capture the value of that preference in another way—here, perhaps, by increasing the initial purchase price and reducing parts prices, a rearrangement unlikely to yield any economic benefits. To the extent existing market power presents a competitive problem, other sections of the antitrust statutes could be used to attack directly such market power."

Baxter also said pretrial rulings in the case left the government in a posture in which it would have to prove at trial that MBNA

has sufficient market power in the overall market in which the "tying" product, Mercedes-Benz passenger cars, competes, to restrain competition in the "tied" product, replacement parts for those cars.

Also remaining open for trial was the question of whether MBNA has a business justification, namely, quality control, for the tying arrangement.

Litigation of those issues would consume resources of the Department of Justice that can be shifted to other matters far more likely to yield competitive benefits to consumers, Baxter said.